IN THE MATTER OF the Ontario Human Rights Code, R.S.O. 1990, Chap. H-19;

AND IN THE MATTER OF the Complaint dated April 7, 1988, made by Duane Baptiste alleging discrimination with respect to the provision of goods, services and facilities on the basis of race, ancestry and place of origin by the Napanee and District Rod & Gun Club

Hearing Date: October 27, 1992

Submissions Dates: December 15, 1992, Commission
January 15, 1993, Respondent
January 20, 1993, Commission, reply

Date of Decision: January 29, 1993

Before: Maryka Omatsu, Chair Board of Inquiry

Appearances by:
- Tony Griffin, counsel for the Ontario Human Rights Commission
- Geoffrey Griffin, counsel for the Napanee and District Rod and Gun Club

Mario Baptiste, nephew of the Complainant, Duane Baptiste, deceased

1. SUMMARY

This Board of Inquiry appointed pursuant to the Ontario Human Rights Code (Code) finds that Duane Baptiste's rights under sections 1 and 8 (now 9) of the Code were infringed by the Napanee and District Rod and Gun Club (NDRGC).

> S. 1 reads: "Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap."
> S. 9 "No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part."

Mr. Baptiste bought a ticket for the NDRGC Walley '87 fishing derby and on May 2, 1987, he caught a fish in the Bay of Quinte off Shannonville. Mr. Baptiste took his fish to the NDRGC weigh-in area where it was logged in at 8.92 pounds; however a NDRGC official refused to let Mr. Baptiste register his fish because he could not produce a fishing licence.

On the facts, the Board finds that the NDRGC discriminated against Mr. Baptiste when the Club refused to let him register his fish in the Walleye 1987 fishing derby because he did not have a fishing licence. Mr. Baptiste, now deceased, was a Mohawk Indian and member of the Bay of Quinte band and as such, he did not require a fishing licence when fishing on his reserve or treaty

areas.

If Mr. Baptiste had been allowed to enter the contest as he should have been permitted to do, he would have been eligible for third prize, valued in 1987 at $973.25.

The Board orders the NDRGC to: i) pay to Nancy Baptiste, the wife of Duane Baptiste, $1,488.94, (the value of the prize plus interest) and $2,000.00 in general damages; ii) write a letter of apology to Mrs. Baptiste; and iii) the terms of this Order to be complied with by the Respondent within 60 days of the date of this Order.

2. INTRODUCTION

On April 7, 1988 the Complainant filed with the Ontario Human Rights Commission (Commission), this complaint against the NDRGC, alleging discrimination in his right to services, goods and facilities on the basis of race, ancestry and place of origin, contrary to sections 1 and 9 of the Code. (Exhibit 2) On January 13, 1989 the Commission conducted a Fact Finding Conference attended by all parties. On October 8, 1990, the Complainant died, (Exhibit 5, tab 6) having named his wife, Nancy Rosalind Baptiste as Executrix and Trustee, upon his death. (Exhibit 5, tab 7) On June 23, 1992, I was appointed by the Minister of Citizenship to conduct an inquiry into the complaint. (Exhibit 1)

The hearing was commenced by conference call on July 2, 1992 to set a date for the hearing of evidence. However as the complainant's wife and executrix, Nancy Baptiste was not on the

call, the matter was put over to the following day. On July 3, 1992, the Commission and Respondent counsel and I agreed in the absence of the Complainant's executrix that the hearing would commence in Kingston on October 27, 1992. Subsequently the Board of Inquiry office was notified that Nancy Baptiste was herself very ill. On July 5, 1992, Nancy Baptiste advised me in writing that she was assigning to her nephew, Mario Baptiste the continuation of the complaint. (Exhibit 3) This was acceptable to all parties.

On October 27, 1992 the presentation of evidence and argument was heard in Kingston, Ontario. On December 1, 1992 I advised the parties by letter, that I had identified an area that had not been addressed during the course of the hearing. I suggested that counsel file submissions with the Board pursuant to the following schedule--December 15, 1992 (Commission); January 8, 1993 (Respondent) and January 20, 1993, Reply, in response to the following questions:

1. If the facts, as agreed upon in the joint statement of fact read into the record, disclose discrimination, is the discrimination properly characterized as indirect discrimination under sections 1 and 9 of the Code?

2. If the agreed facts disclose constructive discrimination is it necessary that a finding of such discrimination be made under s. 11 of the Code? If so, is it necessary that the Complaint be amended to specifically rely on s. 11?

In considering these questions, I asked the parties to consider the case of Toronto (City) Board of Education v. Quereshi

(1991) 14 C.H.R.R. D/243 (a decision of the Ont. Div Ct., on appeal to the Ont. C.A.) and to bring to my attention any other relevant decisions on point.

3. PRELIMINARY MATTERS

i) **Parties to the Complaint**

At the commencement of the oral hearing, counsel for the Commission filed a letter dated March 19, 1992 from the Chief Commissioner of the Ontario Human Rights Commission to Robert Clapp, one of the two named Respondents advising him that he was no longer named in the complaint. (Exhibit 4) This was unopposed by the Respondent, NDRGC and acceptable to the Board.

Neither Commission nor Respondent counsel could advise the Board why the Ministry of Natural Resources (MNR) had not been added as a party to the complaint. (See Facts # 9 - 11, for the discussion on this issue.)

ii) **Preliminary Motions**

Counsel for the NDRGC raised the following objections to the Board proceeding with the hearing of this complaint: a) that there was real prejudice to the Respondent due to the death of the Complainant in that the NDRGC had had no opportunity to hear the Complainant's evidence under oath nor to cross-examine him. b) that this prejudice was further compounded by the five year delay since the event's occurrence and the commencement of the hearing and that the Respondent had not been the cause of the delay.

a) **Prejudice**

As regards the first matter, Respondent counsel relied on S. 10(c) and S. 15 (2)(3), of the Statutory Powers Procedure Act, R.S.O. 1980 c. 484 as amended.

S. 10 (c) reads: "A party to proceedings may at a hearing, conduct cross-examinations of witnesses at a hearing reasonably required for a full and fair disclosure of the facts in relation to which they have given evidence."

S. 15 (2) "Nothing is admissible in evidence at a hearing,

(a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

(b) that is inadmissible by the statute under which the proceedings arise or any other statute.

S. 15 (3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceedings."

NDRGC counsel argued that without the Complainant, certain facts could not be ascertained, that the Complainant had made at least one error in his complaint (in naming Robert Clapp) and that there was the possibility that he could have made other mistakes. Counsel for the Respondent stated that although both he and the Respondent attended the Commission's Fact Finding Conference (FFC) on January 13, 1989, he was advised by Commission staff, not to be adversarial and not to cross-examine parties. The

FFC Notice stated that: "This is an informal meeting. It is not a hearing and statements made are not under oath. However, information gathered may be used in the event of a subsequent hearing." (Exhibit 6) During the Conference, no oaths were administered and no cross-examination of the parties took place. The Respondent added that the NDRGC suffered real prejudice on account of the Commission's tardiness such that the Complainant died before the complaint went to a hearing, and the NDRGC lost its right to cross-examine the Complainant under oath.

Commission counsel responded that the death of the Complainant was not a crucial factor, given that the material facts could be proven and the estate was legally entitled to pursue the case after his death. Section 38 (1) of the Trustee Act, R.S.O. 1990, Vol. 11, Chap. T. 23 was referred to. Section 38 (1) states:

> "Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased but if death results from such injuries no damages shall be allowed for the death or for the loss of the expectation of life, but this proviso is not in derogation of any rights conferred by Part V of 'the Family Law Act.'"

Commission counsel relied on the decision in Vogue Shoes

in replying to the Respondent's prejudice argument. [O.H.R.C. v. Vogue Shoes et al (1991), 14 C.H.R.R. D/425]. In that case, the Complainant, Ms. Maddox, alleged that she had been dismissed by her employer because she was overweight and that this was discrimination on the basis of physical handicap. As in this matter, the complainant died before the issues were put before a board of inquiry. However, in Vogue Shoes, the respondents had had the opportunity to cross-examine the complainant at an examination for discovery in a wrongful dismissal action and the board of inquiry, chaired by Professor Pilkington, found that the parties and factual questions in issue before her were "substantially the same as the issues in the wrongful dismissal action." [at D/429]

In refusing to dismiss the Ms. Maddox complaint, the board also held that it had not lost jurisdiction due to the Complainant's death because of the public interest in ensuring that rights under the Code are enforced. On this point, Professor Pilkington wrote:

> "A complaint pursuant to the Human Rights Code serves not only the private interests of individuals in being free from unlawful discrimination, but also the public interest." [p. D/429]

Neither counsel were able to advise the Board of another case where a Complainant had died, before the commencement of the hearing except for the Vogue Shoes complaint.

b) Delay

On the second point, counsel for the NDRGC stated that on behalf of the Respondent, he had filed his evidence with the Commission in a timely manner and had "not dragged his feet." He argued that the Commission had a duty to act fairly and that as the cause of the delay, it was unfair that the Respondent suffer the consequences of the Commission's inaction.

In reply, Commission counsel relied on the Hyman v. Southam Murray Printing Ltd. board of inquiry decision, in which Professor McCamus held that:

> "a board of inquiry should proceed to attempt to do so, (ie. conduct the hearing) notwithstanding the passage of considerable time, unless the passage of time has made fulfilment of its task impossible." (See: (1981), 3 C.H.R.R. D/621).

As well Commission counsel stated that the test applied by subsequent boards of inquiry has been that an adjudicator may dismiss a complaint because of delay at the outset of a hearing if:

i) the delay has made it impossible for the inquiry into the complaint to proceed; or

ii) the delay has so prejudiced a party in its ability to present evidence that to continue would constitute an abuse of process.

Commission counsel referred to the following decisions in support of its position: Quereshi v. The Board of Education for

the City of Toronto (1987), 9 C.H.R.R. D/4527 (Ont. Bd. Inq.); Morin v. Noranda Inc. (1988), 9 C.H.R.R. D/5245 (Ont. Bd. Inq.); Munsch v. York Condominium Corporation No. 60 (July 2, 1992, unreported Ont. Bd. Inq. decision)

iii) **Decision on the Motions**

At the completion of argument, I advised counsel that I would reserve on these motions and that my rulings would be incorporated in my final written decision.

a) **Prejudice**

I find that the Complainant's death does not result in such significant prejudice to the Respondent that this complaint should be dismissed on this procedural point. As was pointed out in the decision in Vogue Shoes at p. D/429, it is in the public interest that the matter be heard. Professor Pilkington wrote at p. D/428:

> "No doubt the death of a key witness may cause prejudice, particularly to the party who intended to call the witness."

Clearly the estate of the Complainant is most significantly disadvantaged by having to prove its case without the evidence-in-chief of the deceased Complainant. Nonetheless, the Commission, which has the legal requirement to establish a prima facie case of discrimination, was prepared to prove the allegations through other evidence, prior to the parties having entered onto the record, an agreed statement of facts.

Given that the parties engaged in a Fact Finding Session on

January 13, 1989, the Respondent's prejudice lies primarily in its inability to cross-examine the Complainant, as to the particulars of the Complainant's qualifications for the prize--that is, where, how, when the fish was caught. However at best the disadvantage goes to remedy. It affects the question of whether the Complainant would have qualified for a prize and not to the question of whether or not discrimination had occurred.

b) **Delay**

A board of inquiry's statutory authority to dismiss a complaint on the basis of delay is set out in s. 23(1) of the Statutory Powers Procedure Act (SPPA) which states that:

> "A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes."

Although s. 23 (1) of the S.P.P.A. provides a tribunal with the jurisdiction to dismiss a complaint for reason of delay, the delay would have to be of such a nature as to constitute an abuse of its processes. See: Quereshi v. Centra High School of Commerce and the Board of Education for the City of Toronto (supra), at D/4529. The approach to the exercise of this discretion is set forth by Professor McCamus in Hyman v. Southam Murray Printing (supra), at D/621:

> "My own view is that while unreasonable delay might be a factor to be taken into account in refusing or fashioning a remedy...or in weighing the persuasive force or credibility of

testimony or other evidence, delay in initiating or processing a complaint should not be considered a basis for dismissing the complaint at the outset of the proceedings before a board of inquiry unless it has given rise to a situation in which the board of inquiry is of the view that the facts relating to the incident in question cannot be established with sufficient certainty to constitute the basis of a determination that a contravention of the Code has occurred."

Professor McCamus pointed out that adjudicators have required the party claiming unreasonable delay to prove some specific prejudice resulting from the delay. In the case before me, the Respondent did not establish that any significant prejudice had resulted from the delay which did occur, except for the inability to cross-examine the Complainant. The Respondent did not demonstrate that an abuse of process would result by the holding of this Board of Inquiry.

Needless to say, I am very concerned that a period of five years has transpired before the hearing of this complaint; however neither party was the cause of the delay and the Respondent did not disclose an over-riding prejudice to himself that would outweigh the prejudice to the Complainant's estate should this complaint be dismissed. See: Meissner v. 506756 Ontario Ltd. (No. 1) (1989), 11 C.H.R.R. D/94 (Ont. Bd. Inq.).

4. FACTS

Following argument on the preliminary matters, counsel were

granted a recess to finalize an agreed statement of facts. After the break, counsel for the Commission read the following Agreed Statement into the record.

1. The Complainant, Duane Baptiste was a member of the Mohawk Bay of Quinte band.

2. The Complainant entered the NDRGC Walleye 1987 fishing derby.

3. On May 2, 1987, the Complainant was fishing in the Bay of Quinte off Shannonville and sometime between 9 a.m. and 1:30 p.m., he caught a fish.

4. The Complainant took his fish to the official NDRGC weigh-in area to register and weigh-in his fish.

5. The Complainant's fish was weighed-in at 8.92 pounds.

6. The two steps to enter a fish were: i) have the fish weighed and ii) complete an entry form.

7. The Complainant was asked by Mr. Welsman, the chief judge of the contest, for his fishing licence. (Mr. Welsman had been improperly identified by the Complainant as Robert Clapp.) The Complainant said that he had no licence and presented his band card instead.

8. Mr. Welsman informed the Complainant that the law required that he possess a sport fishing licence. The Complainant replied that as a Mohawk he did not require a licence. As there was an impasse, the Complainant took his fish and left.

9. Before May 2, 1987, representatives of the NDRGC got advice from the Ministry of Natural Resources (MNR) as to whether or not band members needed fishing licences to enter the derby. They were

told by MNR, that band members did.

10. The advice that NDRGC received from MNR was incorrect.

11. The correct advice should have been that a band member of the Mohawk Bay of Quinte band could fish in the Bay of Quinte without a licence. (On this point, Chief Hill representing the Mohawk Bay of Quinte band, agreed to limiting the geographical fishing area of his band to the Bay of Quinte, only for the purposes of this hearing.)

12. The weight of the Complainant's fish, 8.92 pounds was sufficient that if the NDRGC had not been given the wrong advice by MNR, the Complainant would have won the third prize.

13. The third prize was an 8 horsepower outboard motor, which was valued in 1987, at $973.25.

The Agreed Statement was supplemented by material filed by the Commission (Exhibit 5). The Commission's Exhibit Book, the contents of which were not contradicted by the Respondent contained the following additional information: 1) The Complainant's band card # C 37789 with his picture and signature. (tab 3) and 2) The Complainant's entry ticket for the Walleye '87 Fishing Derby. The ticket number 4822 is signed by a "R.E. Welsman" who wrote: "Entered 8.92 lb. Without angling license. 1:42 pm. Sat." (tab 4)

In addition, filed as Exhibit 7 was the operative MNR fishing regulation. The regulation stated that: "A Resident of Ontario will **not** require a licence if he or she is: c) a Native Canadian fishing on his or her reserve or treaty area. ("Indian" means Indian as defined under the Indian Act [Canada])."

I accept these facts as agreed to by the Parties and read into the record of these proceedings.

5. LEGAL ARGUMENT

The complaint alleged discrimination on the basis of race, ancestry and place of origin in the provision of services, goods and facilities contrary to Sections 1 and 9 of the Code as amended.

i) **Services**

The Respondent argued that entering a fishing derby was not a right covered by Sections 1 and/or 9 of the Code. I do not accept this argument. Boards of inquiry in several cases have held that "services" include organized competitions and I find that the NDRGC's fishing derby falls under sections 1 and 9 of the Code. I refer to: Cummings v. Ontario Minor Hockey Assn. (1977), 29 R.F.L. 259 (Ont. BOI); Bannerman v. Ontario Minor Hockey Assn. (1977), unreported (Ont. BOI); Mcleod v. Youth Bowling Council of Ontario (1988), 9 C.H.R.R. D/5371 (Ont. BOI), affirmed (1990), 14 C.H.R.R. D/120 (Ont. Div. Ct.)

ii) **Intent**

The Respondent argued that the NDRGC lacked the intent to discriminate against the Complainant and that it had made "an officially induced error" in relying on MNR's misinformation that Indians were required to have fishing permits.

It has long been established in human rights jurisprudence

that it is not necessary to prove intent to discriminate to establish that discrimination has occurred. In O'Malley v. Simpsons-Sears Ltd., Mr. Justice McIntyre for an unanimous Supreme Court of Canada declared at p. D/3106:

> "...we are dealing here with consequences of conduct rather than with punishment for misbehaviour. In other words, we are considering what are essentially civil remedies. The proof of intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination. It is my view that the courts below were in error in finding an intent to discriminate to be a necessary element of proof." (O'Malley (1986) 7 C.H.R.R. D/3102)

iii) **Indirect (S.9) v. Constructive (S. 11) discrimination**

In the present case, the Complainant was disqualified from the fishing derby, not directly and intentionally because of his race, ancestry or place of origin, but because he did not have a fishing licence. On its face, the NDRGC's requirement that fish be caught in a "legal manner" (Exhibit 5, tab 5, rule 7d) is neutral. However the NDRGC's interpretation of this rule was to require that members of the Bay of Quinte band, who entered the competition possessed a fishing licence. This interpretation had the effect that the Complainant who was not otherwise required to have a fishing licence to fish in the Bay of Quinte was either excluded

from the competition or required to purchase a licence that he did not need. The Respondent's rule although neutral on its face was implemented in such a way as to create an adverse impact not only on the Respondent personally but on other members of the Bay of Quinte band.

Query: Was the Respondent's conduct an infringement of the Complainant's rights to equal treatment because of his ancestry contrary to sections 1 and 9?

If there is no finding of indirect discrimination on the basis of ancestry, does this Board of Inquiry have the jurisdiction to read in S. 11(1), especially given that S. 11(1) of the Code was not pleaded? I invited submissions from counsel in response to this question.

Commission counsel, in his December 15, 1992, written submissions to me, wrote that the "complaint form is not a pleading, nor is it evidence." (p. 6) In Cousens v. Canadian Nurses Assn., Professor Ratushny considered allowing the addition of grounds to a complaint at the outset of the hearing. In allowing the amendment and an adjournment for Respondent's counsel if required, Professor Ratushny wrote:

> "The written complaint is not, therefore in the nature of an information or indictment in a criminal case. Rather it serves as general notice to a party in an administrative hearing." (1981) 2 C.H.R.R. D/365.

Part I of the Code sets out the rights that are protected under this Act. Part II by contrast, does not create any rights. Section 11(1) is found in Part II of the Code in the "Interpretation and Application" section. The wording of S. 11(1) explicitly clarifies rights under Part I of the Code. S. 11(1) says:

> "A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or
>
> (b) it is declared in this Act, other than in S. 17, that to discriminate because of such ground is not an infringement of a right."

Commission counsel argued that the discrimination alleged and proven was contrary to s. 9, ie. indirect discrimination and that it was unnecessary to specifically cite S. 11(1) ie. constructive discrimination. In that regard, he referred me to a decision of Professor Hubbard in Velenosi v. Dominion Management et al. (1989) 10 C.H.R.R. D/6413. At p. D/6415, Professor Hubbard wrote:

> "Thus, if a board of inquiry after hearing and considering the evidence and submissions of the parties, were to conclude that there had been constructive discrimination, there can be no

doubt that its authority to find that the complainant's right under the Code had been infringed and its right to make an order accordingly, is not impaired by the absence of any reference to s. 10 (now 11) in the complaint."

(The Divisional Court over-turned the board of inquiry decision in Velenosi, but on other grounds in September, 1991.)

Several months earlier, in May, 1991, the Divisional Court reversed a finding of discrimination made by another board of inquiry, in Toronto (City) Board of Education v. Quereshi. (This decision is currently under appeal to the Ontario Court of Appeal.) In over-turning the board of inquiry decision, the Divisional Court determined in part, that as S. 11(1), of the Code had not been pleaded, the Respondent was caught unawares. I agree with Commission counsel in his written submissions to me, that the decision in Toronto (City) Board of Education v. Quereshi had to do primarily with the lack of notice to the Respondent. (p. 9 of Commission submission, December 15, 1992). I find however, that in this case, the Respondent was aware both of the facts and of the constructive nature of the discrimination alleged and as set out in the Agreed Statement of Facts. [Toronto (City) Board of Education (supra) distinguished.]

I am also mindful that as Chair of this Board, pursuant to S. 39(1) of the Code, it is my statutory duty "to determine whether a right of the complainant under this Act has been infringed." Consequently it is my opinion for all the above reasons, that if I were unable to find a contravention of the Code under sections 1

and 9, it would not have been fatal to the Complainant that section 11(1) had not previously been raised and that I could have considered the interpretative guidance provided by S. 11(1) in making my decision.

However, I find that it is unnecessary for me to consider section 11(1). I am satisfied on the facts, that the Respondent discriminated against the Complainant unintentionally and indirectly because of his ancestry. I do not find it necessary that this complaint include an allegation of a S. 11(1) infringement, as S. 9 clearly prohibits unintentional adverse effect discrimination. In this regard, I rely on the decision of the Supreme Court of Canada in O'Malley. Mr. Justice McIntyre for an unanimous court wrote at D/3106:

> "For essentially the same reasons that led to the conclusion that an intent to discriminate was not required as an element of discrimination contravening the Code, I am of the opinion that this Court may consider adverse effect discrimination as described in these reasons a contradiction of the terms of the Code. An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply."

(Section 4(1) prohibits discrimination in employment and is similar to S. 1 which prohibits discrimination in services.)

In considering this question, I also relied on the 1991

decision of the Ontario Divisional Court in Toronto (City) Board of Education (supra) which also dealt with s. 4 (1) of the Code. In the Toronto (City) Board of Education decision, Mr. Justice O'Leary for the majority, wrote at D/245:

> "I am fully aware that s 4(1) of the Human Rights Code, 1981, S.O. 1981, c. 53 can give rise to a systemic or adverse effect discrimination allegation as well as an allegation of intentional or direct discrimination." [(1991), 14 C.H.R.R. D/243].

Thus I find that the Respondent's rights under sections 1 and 9 have been infringed.

6. CONCLUSION

I thus conclude that it has been established that the Complainant was discriminated against because of his race, ancestry and place of origin by the Respondent in the provision of goods, services and facilities contrary to the Ontario Human Rights Code.

7. REMEDY

The remedial provisions of the Code applicable to the present case are set out in s. 41 (1)

> "Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of s. 9 by a party to the proceeding, the board may, by order,
>
> (a) direct the party to do anything that, in the opinion of

the board, that party ought to do to achieve compliance with this Act, both in respect of the complainant and in respect of future practices; and

(b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish."

i) **Special Damages**

The Commission seeks special damages in the amount of $927.25, the value of the third prize outboard motor plus interest at 10% from the date of the incident (May 2, 1987) until the date of the hearing (October 27, 1992).

In awarding damages, Boards of Inquiry have been guided by the following principles: i) The damages awarded should "restore a complainant as far as is reasonably possible to the position that the complainant would have been in had the discriminatory act not occurred." [Re Piazza and Airport Taxicab (Malton) Assoc. (1989), 69 O.R. (2d) 281 (C.A.) at 284, 10 C.H.R.R. D/6347 at d/6348, para 45017]

and ii) The enforcement of the broader social policy objectives of the Code should be addressed in the award for damages. [Cameron v. Nel-Gor Castle Nursing Home (1984), 5 C.H.R.R. D/2170 at D/2196]

The Respondent's counsel made the following arguments: that

the NDRGC relied on MNR's misinformation, that they now comply with the MNR's fishing regulations, and that to put the Complainant in the position that he would have been in "requires simply that he be awarded the 1987 outboard motor."

Taking into consideration the principles outlined above for awarding damages, I calculate the special damages to have been $973.25 and interest at 10% from April 7, 1988, the date of the filing of the complaint until October 27, 1992, the date of the commencement of this hearing. Although sympathetic to the Respondent's reliance on misinformation provided by an MNR employee, the Respondent did not make a motion to have the MNR added as a Party to the complaint. Moreover since the Fact Finding Conference of January 13, 1989, the Respondent knew that it had violated the MNR Fishing Regulation. During the intervening 3-1/2 years, the Respondent had ample occasion to have resolved the matter, and more importantly to have made a settlement with the Complainant before his death in 1990.

ii) **General Damages**

The Commission relying on Cameron v. Nel-Gor Castle Nursing Home, (supra) seeks general damages in the range of $1500 to $2500 for injury to dignity and the loss of the right to freedom from discrimination.

The Respondent submitted that this was a case for general damages in the range of $250 to $500 because the act of discrimination was not wilful or reckless.

The measure of general damages requires consideration of two factors: the effect of the discrimination upon the Complainant and whether the discrimination was wilful or reckless: Morgoch v. Ottawa (City) (No. 2) (1989), 11 C.H.R.R. D/80

Without the testimony of the Complainant it is difficult to establish the effect of the NDRGC's actions on the Complainant. However, his nephew in a closing statement to the Board, advised that the family's humiliation continued after his uncle's death.

There is no evidence before me to find that the NDRGC acted wilfully or recklessly and after having weighed carefully the special circumstances of this case, I would assess the Complainant's general damages in the amount of $2000.00 for loss of the right of freedom from discrimination and resulting humiliation.

8. ORDER

For the reasons given, it is hereby ordered that:

i) The Respondent make restitution to the Complainant's estate in the amount of $ 3,488.94. (This includes: special damages of $1488.94 [$973.25 plus $515.69 interest] plus general damages of $2000.00.)

ii) The Respondent write a letter of apology to the Complainant's wife.

iii) The above terms are to be complied with by the Respondent within 60 days of the date of this Order.

DATED at Toronto, this 29th day of January, 1993.

MARYKA OMATSU

constituted as a Board of Inquiry